Filed 10/31/16 P. v Johnson CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JOHNSON III, Defendant and Appellant.	D069398 (Super. Ct. No. SCD185174)

APPEAL from an order of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed without prejudice.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Johnson III has completed his sentence following a felony conviction for receiving stolen property. The trial court denied Johnson's application to have this felony conviction designated a misdemeanor conviction pursuant to Penal Code section 1170.18, subdivision (f), which was enacted as part of Proposition 47.[1] On appeal, Johnson acknowledges that he did not meet his initial burden of proof. However, he asks that we remand the matter for a new hearing, because at the time he filed his application there was no precedent that established who had the burden(s) of proof associated with the application procedure. We will affirm without prejudice, in the event Johnson wants to file a new application in which he may attempt to meet his initial burden of demonstrating entitlement to relief under Proposition 47.

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1 Further undesignated references are to the Penal Code.

"A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).) "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (*Id*., subd. (g).)

I.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In November 2004, Johnson pleaded guilty to one count of receiving stolen property in violation of section 496, former subdivision (a) (Stats. 2011, ch. 15, § 372), and admitted a prior strike under section 667, subdivisions (b) through (i). The court accepted the parties' stipulation that the transcript from the preliminary hearing contained the factual basis for the plea, but the transcript is not in the record on appeal. Following the plea, the court denied probation and ordered that Johnson serve a 16-month sentence.[3]

California voters approved Proposition 47, the Safe Neighborhoods and Schools Act, on November 4, 2014, and under the California Constitution (art. II, § 10, subd. (a)) it became effective the following day. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 957 (*Johnson*); *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) " 'Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were

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2 For the record on appeal, Johnson provided a six-page reporter's transcript from his plea and sentencing hearing on November 16, 2004, and a 15-page clerk's transcript. The clerk's transcript contains: the district attorney's felony complaint filed August 30, 2004; Johnson's guilty plea filed November 16, 2004; the court's abstract of judgment filed November 19, 2004; Johnson's application to redesignate his conviction to a misdemeanor filed January 21, 2015; an unsigned, undated, unfiled two-page document entitled "PC 1170.18 Resentencing Review" (Resentencing Review); Johnson's notice of appeal filed December 10, 2015; and court orders filed November 16, 2004 (plea and sentencing hearing) and December 2, 2015 (denial of Johnson's § 1170.18 application).

3 More specifically, the court sentenced Johnson to one-third of the midterm (eight months), doubled due to the prior strike. The court ordered that this sentence be served consecutive to a four-year term, the details of which are not in the record on appeal.

committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).' " (*Johnson*, at p. 957, quoting from *Rivera*, at p. 1091.)

In January 2015, Johnson applied to have his felony conviction for receiving stolen property designated a misdemeanor conviction under Proposition 47.[4] The one-page form contained only the crime of which Johnson was convicted ("PC496(a)") and the statute under which he sought relief ("Penal Code section 1170.18").

The district attorney's responsive Resentencing Review contains general information (name, case number, crime, date of conviction and completion of sentence), followed by a "Factual Basis" of "Legal Ineligibility" which provides in full: "digital camera, laptop, and power adapter. I believe value exceeds $950. Probation report did not place value on items and I did not review police report which is off site."

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4 Actually, the one-page form filed by Johnson requests that his felony sentence be recalled, that his conviction be reduced to a misdemeanor and that he be sentenced to time served without further supervision — which is the relief available only to a "*person currently serving a sentence for*" specified felonies under *subdivision (a)* of section 1170.18. (*Ibid*., italics added.) In contrast, *subdivision (f)* of section 1170.18 applies to a "*person who has completed his or her sentence for*" the specified felonies and allows for the felony conviction to be designated a misdemeanor. (*Ibid*., italics added; see fn. 1, *ante*.) Here, we are proceeding with the understanding that Johnson's trial court's request was an application to have the felony conviction designated a misdemeanor (§ 1170.18, subd. (f)), *not* to recall the sentence, reduce the conviction to a misdemeanor and be resentenced (§ 1170.18, subd. (a)), for the following reasons: (1) Johnson was sentenced to 16 months in 2004; and (2) the Resentencing Review, which Johnson tells us was prepared by the district attorney in response to his application, reflects that Johnson had completed his sentence.

As we explain in part II., *post*, the value of the stolen property in Johnson's possession must be determined in order to know whether Johnson is eligible for Proposition 47 relief. (See §§ 1170.18, subds. (a), (b) & (f), 496.)

By minute order filed December 2, 2015, the trial court ruled in full:

> "[Johnson's] petition under PC 1170.18 alleges that petitioner is eligible for relief but fails to state facts sufficient to make a prima facie showing that relief should be granted. [Johnson's] conviction for PC 496(a) may involve disqualifying facts; according to the District Attorney's Office, [Johnson] *likely* stole an amount that exceeded $950. According [to] *People v. Rivas-Colon* [(2015) 241 Cal.App.4th 444, 449-450,] the burden of eligibility is on the defense. This burden to show that the amount received is under $950 has not been met.
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> "The petition is denied without prejudice.
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> "IT IS SO ORDERED." (Italics added.)

The court filed a formal order denying Johnson's application on the same date.

Johnson timely appealed.

II.

DISCUSSION

As relevant to this appeal, Proposition 47 amended section 496. (*Rivera, supra*, 233 Cal.App.4th at p. 1091.) In part, recently amended section 496, subdivision (a) provides:

> "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, *if the value of the property does not exceed nine hundred fifty dollars ($950), the*

offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year . . . ."[5] (§ 496, subd. (a), italics added.)

(See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 9, p. 72.)

In addition to other relief, Proposition 47 created a procedure whereby those who have completed felony sentences for offenses that became misdemeanors under Proposition 47 could file an application with the trial court to have their felony convictions "designated as misdemeanors." (§ 1170.18, subd. (f); *Rivera*, *supra*, 233 Cal.App.4th at p. 1093.)

A. *Johnson Did Not Meet His Burden of Establishing Initial Eligibility for Relief Under Section 1170.18, Subdivision (f)*

Pursuant to section 1170.18 and the substance of section 496, subdivision (a) (as amended by Prop. 47), Johnson applied to the trial court to designate as a misdemeanor his felony conviction for receiving stolen property.

On appeal, Johnson acknowledges that, under section 1170.18, he has the initial burden of establishing eligibility for relief. Since August of 2015, at least six final appellate opinions have held that the petitioning defendant has the initial burden of establishing eligibility for *resentencing* of the conviction under *subdivision (a)* of

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5 Prior to Proposition 47, the last quoted sentence provided: "However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed nine hundred fifty dollars ($950), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year." (§ 496, former subd. (a); Stats. 2011, ch. 15, § 372.)

section 1170.18.[6] (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*); *People v. Rivas-Colon, supra,* 241 Cal.App.4th at pp. 449-450; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 (*Perkins*); *People v. Bush* (2016) 245 Cal.App.4th 992, 1007; *Johnson, supra*, 1 Cal.App.5th at p. 961; *People v. Hudson* (2016) 2 Cal.App.5th 575, 583.) There is no principled reason not to use the same standard and to require that an applying defendant has the initial burden of establishing eligibility for *redesignation* of the conviction under *subdivision (f)* of section 1170.18. Notably, both parties agree.

Thus, we conclude that Johnson had the *initial* burden of establishing eligibility for redesignation, which includes presenting *evidence* that he "would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense" (§ 1170.18, subd. (f)).[7] (See *Johnson, supra,* 1 Cal.App.5th at p. 962 [identical ruling under § 1170.18, subd. (a)].) As applicable here, this means *evidence* that "the value of the property does not exceed nine hundred fifty dollars ($950)" (§ 496, subd. (a). (See *Johnson,* at p. 962 [identical ruling under § 1170.18, subd. (a)].)

We agree with both parties that Johnson did not meet his initial burden here and, accordingly, will affirm the order of the superior court. Although Johnson asks that "the

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6 "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . [section] 496 . . . of the Penal Code, as th[at] section[] ha[s] been amended . . . by this act." (§ 1170.18, subd. (a).)

7 We express no opinion as to who bears any other burdens during the section 1170.18, subdivision (f) application process.

matter be remanded to the Superior Court for further proceedings as to whether the property exceeded $950 in value," we are aware of no authority (and Johnson does not provide any) that allows us to remand a matter for further proceedings when we have concluded that the trial court did not err.

B. *The Affirmance Is Without Prejudice*

In *Perkins*, *supra*, 244 Cal.App.4th 129, our colleagues in Division Two affirmed the trial court's order denying the appellant's section 1170.18, subdivision (a) petition on the basis that the appellant did not meet his burden of providing evidence of his eligibility for Proposition 47 relief — in particular, evidence that the value of the property at issue did not exceed $950 — on his felony conviction for receiving stolen property under section 496, former subdivision (a). (*Perkins*, at pp. 134-135, 137.) The *Perkins* court noted that Proposition 47 is silent as to the burdens associated with petitioning for relief, and neither at the time the appellant filed his petition nor at the time the trial court ruled on the petition had any appellate court provided guidance as to the burden of establishing eligibility. (*Perkins*, at pp. 136, 142.) Accordingly, in *Perkins* the affirmance was without prejudice to the appellant filing a new Proposition 47 petition that offered *evidence* of his eligibility. (*Id*. at p. 142.)

Following *Perkins*, we reached the same conclusion in *Johnson*, *supra*, 1 Cal.App.5th at page 971.

In the present case, Johnson filed his application *in January 2015*. Seven months later *in August 2015*, we filed *Sherow*, *supra*, 239 Cal.App.4th 875 — i.e., the first appellate authority to interpret Proposition 47 to require the party seeking relief under

Proposition 47 to meet an initial burden of proof. (*Sherow*, at p. 879.) Thus, Johnson did not have the benefit of this guidance at the time he filed his application.[8] Indeed, later authorities are even more instructive. As *Johnson* advises, for example, a proper application from Johnson " 'could certainly contain at least [his] testimony about the nature of the [stolen property]' " and " 'should describe the stolen property and attach some evidence, whether a declaration, court documents, record citations, or other probative evidence showing he is eligible for relief.' " (*Johnson*, *supra*, 1 Cal.App.5th at p. 970.)

Accordingly, our affirmance of the order denying Johnson's section 1170.18, subdivision (f) application is without prejudice to the superior court's consideration of a subsequent application that contains *evidence* of Johnson's eligibility for relief under Proposition 47.[9]

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8 Even though we assume the district attorney filed the Resentencing Review, since it is unsigned, undated, unfiled and contains no proof of service, we do not know whether it was prepared before or after *Sherow* and the other authorities cited in the text, *ante*.

9 We express no opinion as to what evidence Johnson must rely on, how the People might respond, or whether such an application might be successful.

DISPOSITION

We affirm the December 2, 2015 order denying Johnson's application to designate as a misdemeanor his felony conviction for receiving stolen property. This affirmance is without prejudice to the superior court's consideration of a subsequent application by Johnson that offers evidence of his eligibility for the requested relief.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.